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CHARLES ELM

SUPREME COURT OF THE UNITED STATES

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No. ~~766~~ 50

T. L. CARPENTER AND LILLIE V. CARPENTER,
PETITIONERS,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

J. B. MOORE,
STEPHEN A. GEORGE,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable The Supreme Court of The United States:

Your petitioners, T. L. Carpenter and Lillie V. Carpenter, respectfully pray for a writ of *certiorari* to the Supreme Court of the State of Oklahoma, to reverse a judgment rendered by it on the 18th day of December, 1928 (R. 53, Print 56), which affirmed a judgment of the District Court of Oklahoma County, theretofore rendered against your petitioners, and in support thereof, respectfully represent and show:

STATEMENT OF THE CASE

Your petitioners, T. L. Carpenter and Lillie V. Carpenter (husband and wife), and their assignors, Mattie L. V. Zachary, *nee* Morris, and Julia A. Morris, are each members of the Choctaw Nation or Tribe of Indians; the said T. L. Carpenter being duly enrolled as an intermarried citizen of said Nation or Tribe of Indians, the said Lillie V. Carpenter being enrolled as one-sixteenth Choctaw blood, the said Mattie L. V. Zachary, *nee* Morris, being enrolled as one-sixty-fourth Choctaw blood and the said Julia A. Morris being enrolled as one-thirty-second Choctaw blood. That as such Choctaw Indians, there were alloted and patented, in severalty, to these petitioners and their assignors, above named, certain lands situated in Carter County, State of Oklahoma, as their portion of the allotable lands of the Chickasaw and Choctaw Tribes or Nations of Indians, which lands are described in the record. That patent covering that portion of the lands involved in this action belonging to the petitioner, T. L. Carpenter, was issued to him on February 27th, 1907; patent covering that portion of the lands belonging to Lillie V. Carpenter, involved in this action, was issued to her on October 10th, 1906; patent covering that portion of the lands belonging to the said Mattie L. V. Zachary, *nee* Morris, was issued to her on December 5th, 1908; and patent covering that portion of the land involved in this action belonging to the said Julia A. Morris was issued to her on October 10th, 1906.

That by the terms of the Act of Congress of May 27th, 1908 (35 Statute at Large, 312, Chapter 199), all restrictions against the alienation of said lands by said allottees, were removed, except that of minority as to the said Mattie L. V. Zachary, *nee* Morris, who was then a minor; and thereafter, said allottees duly leased their allotments to various persons, firms and corporations, named in the record, who thereafter found and produced oil and gas therefrom in paying quantities. That each of said leases reserved unto the lessors, the allottees of said lands, respectively, a royalty of one-eighth of all oil and gas produced and saved from

said premises by said lessees, respectively, and that during all times involved in this action said lessees were engaged in the operation of said leases and the production of oil and gas therefrom, and were during all of such times and have ever since been, and now are, paying royalties thereon to your petitioners and their assignors, under the terms and provisions of said leases.

Your petitioners further show to this Honorable Court that the Legislature of Oklahoma, in 1916, passed an act, commonly known as the Gross Production Tax Statute of said State, being Section 9814, Compiled Oklahoma Statutes, 1921, and providing among other things, for the payment of a tax of three *per centum* of the gross value of all oil and gas produced within said State; the payment of said taxes to be made quarterly for the periods ending March 31st, June 30th, September 30th and December 31st, of each year. Said Act provides that same shall apply both to the lessee, or producer, and the royalty or fee owner, except as to such royalty interests of the State of Oklahoma and royalty interests as are exempt from taxation under the laws of the United States; and it is further provided that:

> "The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, upon, school districts and other municipalities, *any property rights attached to or inherent in the right to said minerals,* upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas, *upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land,* upon the machinery, appliances and equipment used in and around any well producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, min-

erals or property hereinbefore in this paragraph mentioned or described."

Under and in pursuance of the aforesaid statute (Section 9814 C. O. S., 1921), the respondent herein, as State Auditor, demanded of these petitioners and their assignors the payment to him of a tax computed upon the basis of three *per centum* of the gross value of, and as a tax upon their *pro rata* share of all oil and gas produced from their allotments respectively; and threatened to issue an order to the lessees or purchaser of said oil and gas to withhold from the petitioners and their assignors, respectively, a sufficient part of their royalties to pay the tax demanded by him, claiming as his authority therefor, an Act of the Legislature of the State of Oklahoma, passed in 1925, which became effective April 7th, 1925, and which reads in part as follows:

> "The purchaser of all oil, gas or other minerals as hereinbefore referred to, shall recognize the State Auditor's order to withhold payment for all production wherein the gross production tax and penalty are unpaid, until such tax and penalty are paid, and on failure of the producer or royalty owner to pay such tax and penalty, the purchaser of such production shall, on order of the State Auditor, pay such tax and penalty, and his receipt therefor shall be accepted by such producer or royalty owner in lieu of cash in settlement for such production."

Thereafter, and on or about the 30th day of April, 1927, the petitioners and their assignors paid to the respondent herein as State Auditor of the State of Oklahoma, the amount of taxes demanded by him from the petitioners and their assignors upon the royalties received by them during the year 1926, and, the first quarter ending March 31st, 1927; and at the time of the payment thereof, said parties served a written notice of protest upon the respondent that said taxes were illegally and wrongfully demanded of them, and that the same were being paid under protest, and that suit would be instituted against him within thirty days thereafter for the recovery of said taxes; as provided by

the terms of Section 9973, C. O. S., 1921. The claims of the said Mattie L. V. Zachary, *nee* Morris, and Julia A. Morris, having been assigned to the petitioners herein, said petitioners commenced an action against the respondent as State Auditor in the District Court of Oklahoma County, within the time and manner as provided by Section 9971, C. O. S., 1921, *supra*, for the recovery of the aforesaid taxes (R. 5, Print 1).

The respondent filed a demurrer to the amended petition filed in said trial Court, which demurrer was sustained by said Court (R. 25-26, Print 24), and the petitioners then appealed to the Supreme Court of the State of Oklahoma, where the judgment of the trial Court was affirmed and the following principles of law were announced in the Syllabus, to-wit:

> "By Section 9971, C. O. S., 1921, the right to maintain an action for the recovery of an illegal tax is conditioned on compliance with all requirements therein contained, one of which is that the amount of taxes assessed shall be paid at the time and in the manner provided by law. Where a petition on its face shows that there has been no compliance with one of the essential requisites, it fails to state a cause of action.
>
> "Oil when discovered and reduced to possession by being detached from the soil in which it is embedded becomes and is personal property and is subject to state gross production tax.
>
> "By the provisions of the Act of Congress of June 28, 1898, 30 Stats. 495, known as the Atoka Agreement, the allotments of Choctaw and Chickasaw Indians were made to be exempt from taxes so long as title remained in the original allottees, not exceeding 21 years from the date of patent, but said exemption from taxation did not extend to personal property.
>
> "By Act of Congress, May 27, 1908, 35 Stats. 312, restriction from alienation was removed from all lands of allottees of the Five Civilized Tribes enrolled as intermarried whites, freemen, and mixed-blood Indians

having less than one-half Indian blood, including minors, and in consequence thereof appellants were at liberty to execute oil and gas leases to their lands without interference or regulation on the part of a federal government agency. Held oil produced under a royalty interest is subject to the gross production tax of the State of Oklahoma, notwithstanding that the land upon which the oil was produced is exempt from taxation.

"Oil discovered and reduced to possession is a personal property and is not exempt from State taxation by the Constitution of the State of Oklahoma.

"The property upon which the tax in question was levied is not exempt from State taxation by the Constitution of the United States, or by an Act of Congress, or treaty with the Indians.

"The gross production tax of the State of Oklahoma, as levied under the facts in the instant case, is not a tax upon a federal instrumentality" (R. 31, Print 27-29).

Petition to rehear was filed in due time, which was overruled and denied by the Supreme Court on December 18th, 1928 (R. 53, Print 56), and your petitioners now seek to bring the matter before this Court for a writ of *certiorari*, to review the action of the Supreme Court of the State of Oklahoma, on account of the errors of said Court, as hereinafter set out.

STATEMENT OF THE ISSUES

Section 29 of the Act of Congress of June 28, 1898 (30 Statute at Large, 505, Chapter 517), commonly known as the Atoka Agreement, under which the lands involved in this action were allotted to the petitioners and their assignors in severalty, provides that:

> "All the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed twenty-one years from the date of patent."

The petitioners pleaded that pursuant to the provisions

of the statute just quoted, and the Constitution and laws of the State of Oklahoma, their several allotments and the issues, rents, revenues, royalties and proceeds arising therefrom, including said royalty oil and gas, were exempt to them, and not subject to taxation in any manner or for any purpose, as long as title to said lands remained in them, respectively, for a period of twenty-one years from the date of the issuance of patents, respectively; that such periods had not expired and that petitioners and their assignors had not parted with their title to their respective allotments; and that under the terms of the gross production statute of the State of Oklahoma, as construed by the Supreme Court of said State, said tax was not a tax upon the minerals after severance from the soil, but a property tax, the equivalent of an *ad valorem* tax, and in full and in lieu of all taxes by the State, counties, cities, towns, townships and school districts, upon the minerals produced and the land from which the same was produced during the taxable year; and that therefore, said taxes were wrongfully and illegally exacted from the petitioners and their assignors; the contention of petitioners being that the royalties involved were not taxable, inasmuch as the same were produced from their allotted lands which were not taxable under the provisions of the Federal Statute above referred to.

Choate vs. *Trapp*, 224 U. S. 665, 56 L. Ed. 941;
Pollock vs. *Farmers Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759;
Thomas vs. *Gay*, 169 U. S. 264, 42 L. Ed. 740;
Gillespie vs. *State of Okla.*, 257 U. S. 501, 66 L. Ed. 338;
Jaybird Mining Co. vs. *Weir*, 46 Sup. Ct. Rep. 582;
Colonial Trust Co. vs. *Lewellyn*, 12 Fed. (2nd) 481.

There are two points decided in this case by the State Court: First, that the royalties involved in this action are taxable under the gross production statute, *supra;* and second, that only such portions of the tax protested as was paid at the time and in the manner as provided by Section 9971, C. O. S., 1921, could be recovered, even though the gross pro-

duction statute should be held not to apply to the royalties involved in this action.

We shall consider these in the order above stated, because, if it be held by this Court that the royalties involved are in fact taxable under the gross production tax statute of Oklahoma, then it will be unnecessary for the Court to examine the decision of the Oklahoma Supreme Court for error upon the question of the time of payment.

POINT ONE

It is the contention of the petitioners that said royalties represent the proceeds of the sale of a part of the *corpus* of their allotted lands. *Lake Superior Consolidated Iron Mines, et al.*, vs. *Lord*, 271 U. S. 577, 70 L. Ed. 1093; *Gabe E. Parker* vs. *Tootie Riley*, 63 L. Ed. 847; *State* vs. *Snyder*, (Wyo.) 212 Pac. 758; *State of Texas* vs. *Hatcher*, (Tex.) 287 S. W. 192; *Opinions from Attorney General*, Vol. 19, Page 161; *Barnes* v. *Keys*, (Okla.) 127 Pac. 261, 37 Okla. 6; *Rick* vs. *Donneghey*, 71 Okla. 204, 177 Pac. 86; *Strawn* vs. *Brady*, 84 Okla. 66, 202 Pac. 505; *Wilson, et al.*, vs. *Hughes, et al.*, (W. Va.) 28 S. E. 781.

Further, even should said royalties be considered as ordinary rents and produce, nevertheless, they are not taxable, because a tax upon the same is a tax upon the land from which they were produced. *Thomas* vs. *Gay*, 42 L. Ed. 740; *Gillespie* vs. *State of Oklahoma, supra; Indian Territory Illuminating Oil Co.* vs. *State of Oklahoma*, 240 U. S. 522, 60 L. Ed. 779; *Choctaw O. G. R. Co.* vs. *Harrison*, 235 U. S. 292, 29 L. Ed. 234; *Pollock* vs. *Farmers Loan & Trust Co., supra.*

It is the further contention of the petitioners that if it be held that said tax is levied upon the minerals after severance, as personal property, wholly separate and distinct from the land, then such tax is not uniform, as required by the Oklahoma Constitution, Section 5, Article 10, for the reason that said tax, when applied to others of the same class, covers and includes other valuable property rights

which are taxable under the State law; and also violates the 5th and 14th Amendments to the Constitution of the United States. *Sioux City Bridge Co.* vs. *Dakota County, Neb.*, 67 L. Ed. 340.

POINT TWO

While the headnotes quoted above from the opinion of the Supreme Court of Oklahoma in this case do not disclose the fact, nevertheless, that opinion holds that all that portion of said taxes which were not paid before delinquency could not be recovered, even though plaintiffs should recover the portion which was paid before becoming delinquent. Section 9814, C. O. S., 1921, provides that said gross production tax shall be paid within thirty days from the date the same becomes due, and if not paid within such time, said taxes become delinquent and bears eighteen per cent. penalty thereafter. The State Court holds that the taxes paid for the year 1926 were delinquent at the time of payment, and that plaintiffs cannot recover such taxes for that reason, if for no other. Such holding, of course, would not apply to that portion of taxes paid for the first quarter of 1927, for the reason that the same were paid at the time and in the manner as provided by the Oklahoma Statute, and before delinquency.

It is the petitioners' contention on this feature of the case that the State is without jurisdiction to levy the tax on the royalties accruing to the petitioners and their assignors, and that such tax is void as to them; and that the rule applied by the State Court is therefore in conflict with *Ward* vs. *Love County*, 253 U. S. 17, 64 L. Ed. 751.

WHEREFORE, petitioners pray that writ of *certiorari* may issue out of and under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, requiring it to certify the case to this Court and reverse their determination, as provided by the Judicial Code of the United States, and amendments thereto, or that your petitioners may have such other or further relief or remedy in the premises as this Court may deem appropriate and in con-

formity with the provisions of said Judicial Code, and that the said judgment of the Supreme Court of the State of Oklahoma, and every part thereof, may be reversed by this Honorable Court.

J. B. Moore,
Stephen A. George,
Counsel for Petitioners.